FILE COPY.

1381

Office Supreme Court U
FILED
JAN 18 1904
JAMES H. McKENNEY,
Cle

Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,

Appellants,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK *et al.*,

Appellees.

No. 150.
OCTOBER TERM, 1903.

BRIEF FOR THE APPELLEES, THE RAPID TRANSIT BOARD, ITS MEMBERS, THE RAPID TRANSIT SUBWAY CONSTRUCTION CO. AND JOHN B. McDONALD.

EDWARD M. SHEPARD,
GEORGE W. WICKERSHAM,
DE LANCEY NICOLL,
Of Counsel for Appellees,
New York City, N. Y.

[18717]

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 150.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants-Appellants,

vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS, *et al.*,
Defendants-Appellees.

Brief for the Appellees, The Rapid Transit Board, its Members, the Subway Construction Company, and others.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing the complainants' bill for want of jurisdiction.

The City of New York is building a rapid transit railroad under some of its streets at a cost of $36,500,000 (Bill *p.* 29). The work has long been under construction (*p.* 31). It is prosecuted by the City under rapid transit legislation of the State of New York, through the agency of the Rapid

Transit Board of the City acting for it and of a contractor acting under a contract made between him and the Board (*pp.* 28, 29).

The complainants filed their bill in the Court below to enjoin continuance of this great public work and to obtain a receiver of the enterprise (*pp.* 34-35). Their bill includes much legal discussion, many quotations or citations of constitutional and statutory provisions, and also long and various quotations from opinions of lawyers and of courts, some of the latter being dissenting opinions. It is nearly, if not quite, as much a brief of law as it is a bill in equity. The relief was sought upon allegations which, it is claimed, showed—

1. That the complainants had an exclusive right under a contract with the State of New York, to the use for underground railroad purposes of the streets now sought to be used by the City for its own municipal rapid transit road (*pp.* 8, 13, 28).

2. That the municipal construction, and also the legislation of the State which authorized it, were in violation of such contract between the State and the complainants (*p.* 32).

3. That such rapid transit legislation violated the constitution of the State (*pp.* 14-28), and that the contract made by the defendants constituting the Rapid Transit Board acting for the City in the construction of the municipal road, was void (*p.* 30), because there was no authority for it other than such leg-

islation. Also that such legislation was void as in conflict with the fourteenth amendment of the federal constitution (*p.* 32).

4. That such contract was made improvidently and collusively and to the waste of public funds and property (*pp.* 28-30),—all of which the complainants asserted as tax-payers rather than because of their alleged exclusive rights. In addition to their claims to an injunction in support and defense of the exclusive right under the fancied contract which they asserted,—they sought as such tax-payers to enjoin the further continuance of such municipal work.

All the parties to the suit were citizens of the State of New York (*pp.* 3-4); and federal jurisdiction was claimed solely on the ground that the State,—by its authorization of the municipal construction for the City of New York of a rapid transit railroad in the streets included in the complainants' route,—was violating contract and exclusive rights of the complainants. The complainants' supposed contract rights are described in paragraphs I-VII of the bill at pp. 4-18, and in paragraphs IX-X at p. 25. Disentangling the essential facts, from the mass of argument, the nature of their claim is simple. The rights claimed consist of:

FIRST:—An asserted right of the Central Tunnel Railway Company (which we shall call the *Central Company*) to construct and maintain

a tunnel railroad. The right is claimed to have been created in the years 1881, 1882 and 1883, merely by incorporation under the general railroad law and the so-called tunnel law of the State, and by filing a map and profile of its route. The bill alleged that no railroad had been commenced under such asserted right, and imputed the delay of the Central Company to laches of the Supreme Court of the State and to acts of the defendants (*p.* 8). Such acts of the defendants were later in the bill (paragraphs XIII-XX at *pp.* 26-33) alleged to have been committed under, and subsequent to the enactment of, the rapid transit act, being chap. 752 of the laws of New York of 1894. The physical acts of the defendants in their rapid transit construction are alleged (*pp.* 28-29) to have taken place after 24th February, 1900. So that the right, if there were any, of the appellants under the Central Company was not actually interfered with by the defendants for upwards of sixteen years after the supposed right is claimed to have been complete. During those years nothing was done under such supposed right.

SECOND.—An asserted right of the complainant, the Underground Railroad of the City of New York (which we shall call the *Underground Company*), set out in paragraph V at *pp.* 10-12. That company was a consoli-

dated corporation into which were merged the Central Company and two other companies whose lines were said to continuously connect with its line. The consolidation was effected on 6th October, 1896; and at that time a tax of one-eighth of one per cent. upon the amount of its capital stock was paid to the treasurer of the State of New York in pursuance of its tax law, chap. 908 of the laws of 1896 (*p.* 11). On 10th June, 1897, the Underground Company filed a map and profile of its routes (*p.* 12). The complainants claimed that it was vested with the right of the Central Company by the consolidation and gained a new right of its own by such payment of tax and filing of a map and profile.

THIRD:—An asserted right of the complainant, the Rapid Transit Underground Railroad Company, which we shall call the *Complainant Rapid Transit Company*. It is alleged to have been incorporated on 9th April, 1897, under the general railroad laws of New York, and in pursuance of the tax laws already mentioned, to have paid to the treasurer of New York on 10th April, 1897, the sum of $125, being one-eighth of one per cent. upon its capital stock. On 11th October, 1897, the Company is alleged to have filed a map and profile of its route. Such incorporation, payment of tax and filing of map and profile make up the sole support alleged for this claim.

The asserted right of the Central Company having passed in consolidation to the Underground Company, the latter is alleged, on the 29th April, 1897, to have leased its road and routes to the complainant Rapid Transit Company in April, 1897 (*p.* 14).

The defendants demurred to the bill (1) on the ground that the Court below was without jurisdiction in that the matter in dispute did not arise under the Constitution or laws of the United States, and (2) for want of equity, and (3) because the bill was multifarious, and (4) for laches (*pp.* 44-51).

The court below sustained the demurrers and entered a decree dismissing the bill for want of jurisdiction (*p.* 61).

The court below certified to this Court (*p.* 62) that in the suit the jurisdiction of the court was an issue; and it further certified to this Court two questions of jurisdiction which were recited to have been raised by the demurrers, and which were as follows (*p.* 62):

1. "*When a Circuit Court of the United States "decides that the complainant to a bill of "equity brought to enforce an alleged "right which he claims arises under the "Constitution of the United States shows "no right arising under the Constitution "of the United States, has said Court jur- "isdiction to decide and hear and deter- "mine other matters of equitable cogniz- "ance pleaded in said bill which do not "arise either under the Constitution of the "United States or a statute or a treaty*

"*thereof, if the complainant and defend-*
"*ant are citizens of the same State?*

2. "*Has this Court (the Circuit Court) juris-*
"*diction of the said amended bill in*
"*equity?*"

The latter is obviously the first question to determine.

I.

The court below was without jurisdiction.

FIRST.—Before there can be any jurisdiction there must be a federal question; and here there is no such question, for the matter in dispute did not arise under the Constitution or laws of the United States. Federal jurisdiction is claimed solely on the ground that the complainants have rights founded upon contract between them and the State of New York, and that the state by its Rapid Transit act of 1894 and the defendants by their procedure under that act are violating such contract rights. The bill did not, however, present, nor did it even begin to present, the question of a violation by the State of contract rights. For none of its allegations showed, or tended to show, the existence of any contract between the State and either of the complainants.

It is true that in the bill of complaint there are

many *legal assertions* of contract rights and much learned argument and discussion; but the *facts alleged* do not show, or tend to show, any such right. We do not, for the present, insist, or need to insist, that, if the allegations of the bill called for an examination of the facts or any serious consideration of the law in order to determine whether the right in fact existed, a decision on the merits adverse to the complainants would oust the jurisdiction of the Court. We do submit that the allegations of the bill neither establish a contract, nor present for any genuine controversy or discussion the question whether there were a contract. No such question is in substantial verity presented by the bill.

If the question were, What is the correct addition of a thousand different sums, each represented by many figures? it would require time, and perhaps pains, and perhaps accountants, to reach the result. But such time and pains and expert aid would not raise the arithmetical process to the rank of real discussion or argument. Although it may here take a little time and attention to disentangle the relevant facts from the mass of irrelevant facts stated in the bill and to separate the question, or rather the *simulacrum* of a question, of law from many pages of legal discussion and quotations, nevertheless, when this troublesome and necessary work is done, it will be found that there remains no real, or really arguable, basis for the assertion of a contract right in the complainants to construct exclusively, or to construct at all, a railroad in streets of the City

of New York. The court below was, therefore, without jurisdiction.

Defiance Water Co. v. *Defiance, 191 U. S., 184:* The complainant sought the federal court on the ground that, by an ordinance of the defendant City, it was attempted to impair a contract right of the complainant. The Circuit Court retained jurisdiction, but dismissed the bill on its merits. This Court reversed the decree below at the appellant's cost and directed a dismissal for want of jurisdiction, saying, per FULLER, *C. J.* (p. 190):

> "We have repeatedly held that when a "suit does not really and substantially in- "volve a dispute or controversy as to the "effect or construction of the Constitution "or laws of the United States, upon the de- "termination of which the result depends, it "is not a suit arising under the Constitution "or laws. And it must appear on the record, "by a statement in legal and logical form, "such as is required in good pleading, that "the suit is one which does really and sub- "stantially involve a dispute or controversy "as to a right which depends on the construc- "tion of the Constitution or some law or "treaty of the United States, before juris- "diction can be maintained on this ground "(*Western Union Telegraph Co.* v. *Ann Ar- "bor Railroad Co., 178 U. S., 239; Gold "Washing & Water Co.* v. *Keyes, 96 U. S., "199; Blackburn* v. *Portland Gold Mining "Co., 175 U. S., 571; Shrevesport* v. *Cole, 129 "U. S., 36; New Orleans* v. *Benjamin, 153 U. "S., 411, 424).* * * *

(p. 194): "The fundamental question of "jurisdiction, first, of this Court, and then

" of the court from which the record comes,
" presents itself on every writ of error or ap-
" peal, and must be answered by the Court,
" whether propounded by counsel or not."

Shreveport v. *Cole, 129 U. S., 36 per* FULLER, *C. J.:*

" Unless this suit was one 'arising under the
" ' Constitution or laws of the United States'
" the Circuit Court had no jurisdiction; and
" if it did not really and substantially involve
" a dispute or controversy as to the effect or
" construction of the Constitution or some
" law upon the determination of which the
" recovery depended, then it was not a suit so
" arising."

St. Paul M. & M. R. Co. v. *St. Paul & N. P. R. Co., 68 Fed. Rep., 2, per* THAYER, *J., delivering the opinion of the Circuit Court of Appeals in the Eighth Circuit:*

" It does not follow, however, that the case
" at bar is one of federal cognizance, because
" it contains a reference to numerous acts of
" Congress and lengthy extracts therefrom.
" A case which, in fact, depends for its de-
" cision upon questions of local or general law
" cannot be brought within the jurisdiction
" of a federal tribunal as one arising under the
" Constitution and laws of the United States
" merely by reference in the complaint or dec-
" laration to some federal statute or statutes
" and by setting up a claim thereunder which
" is merely colorable and obviously without
" any reasonable foundation. If such a prac-
" tice was tolerated, the result would be that
" the jurisdiction of the federal courts would

" be unduly enlarged and made to comprehend
" a class of cases which were never intended
" to be tried therein."

McCain v. *Des Moines, 174 U. S., 168:* The corporate acts of the defendant City in levying certain taxes under an act of the legislature of Iowa passed in 1890, were attacked as unconstitutional, and the threatened proceedings to take the complainant's property was alleged to be contrary to the federal constitution. The bill was filed in the Circuit Court which sustained the defendant's demurrer for want of jurisdiction. This Court affirmed the decree saying, per PECKHAM, *J.*:

" It is therefore quite plain that the com-
" plainants base their case upon the allegation
" that their property is about to be taken from
" them by the city authorities without due
" process of law and in violation of the Con-
" stitution of the United States, because the
" act of 1890 violates the constitution of Iowa.
" That is a question of law, depending for its
" solution upon the law of Iowa, and as to
" what that law is the federal courts are
" bound in such a case as this by the decision
" of the state tribunal. There is no construc-
" tion of the Federal Constitution involved in
" that inquiry, nor any question as to its ef-
" fect upon the complainants' rights in this
" suit. The question whether their property is
" taken without due process of law must be de-
" cided with sole reference to the law of Iowa.
" How can it be said upon such facts that any
" question arises under the Constitution or
" laws of the United States? The claim of
" the complainants will not be defeated by one

" construction of that clause in the Constitu-
" tion or sanctioned by the other. *Starin* v.
" *New York*, 115 U. S., 248. There is no dis-
" pute about construction in any way what-
" ever; the only question is as to the validity
" of the city organization, which, as stated,
" is a matter of state law. * * *

" Such being the law of Iowa, we are of
" opinion that an allegation in the bill that
" this is a controversy and a suit of a civil
" nature arising under the constitution and
" laws of the United States, is not supported
" by the facts appearing in the bill. The
" facts alleged must show the nature of the
" suit, and it must plainly appear that it arises
" under the Constitution or laws of the United
" States; that is, there must be a real and sub-
" stantial dispute as to the effect or construc-
" tion of the Constitution or of some law of
" the United States upon the determination
" of which a recovery depends. (*Shreveport*
" v. *Cole, 129 U. S., 36; New Orleans* v. *Ben-*
" *jamin, 153 U. S., 411*)."

Western Union Co. v. *Ann Arbor Co., 178 U. S., 239, per* FULLER, *C. J., at p. 243:*

" When a suit does not really and substan-
" tially involve a dispute or controversy as to
" the effect or construction of the Constitution
" or laws of the United States, upon the de-
" termination of which the result depends, it
" is not a suit arising under the Constitution
" or laws. And it must appear on the record,
" by a statement in legal and logical form,
" such as is required in good pleading, that
" the suit is one which does really and sub-
" stantially involve a dispute or controversy

"as to a right which depends on the construc-
"tion of the Constitution or some law or treaty
"of the United States, before jurisdiction can
"be maintained on this ground. *Gold Wash-*
"*ing & Water Co.* v. *Keyes, 96 U. S., 199*;
"*Blackburn* v. *Portland Gold Mining Co., 175*
"*U. S. 571.*"

SECOND:—The court below had, therefore, if it were to retain jurisdiction, to find in the allegations of the bill a real and substantive federal question. Obviously there can be no real and substantive federal question unless the bill really and substantively present the question of a contract right held by the complainants against the State of New York. Assuming the truth of the allegations of fact, some contract, real or apparent, must be made out. Otherwise there is no jurisdiction.

New Orleans v. *New Orleans Water Co., 142 U. S., 79, 88:* This was error to the Supreme Court of Louisiana. The Court dismissed the writ saying, per Mr. Justice BROWN (pp. 87-88):

"While there is in the amended and supple-
"mental answer of the City a formal averment
"that the ordinance No. 909 impaired the ob-
"ligation of a contract arising out of the act
"of 1877, which entitled the city to a supply
"of water free of charge, the bare averment
"of a federal question is not in all cases suf-
"ficient. It must not be wholly without
"foundation. There must be at least color
"of ground for such averment, otherwise a
"federal question might be set up in almost
"any case and the jurisdiction of this court

" invoked simply for the purpose of delay. " Thus in *Millingar* v. *Hartupee, 6 Wall, 258,* " it was held that to bring a case within that " provision of the Judiciary Act which de- " clares that the final judgment of a state " court may be re-examined where is drawn " in question the validity of an authority exer- " cised under the United States, there must " be something more than a bare assertion of " the exercise of such authority. In deliver- " ing the opinion of the Court the Chief Jus- " tice observed: ' * * * In respect to the " ' question we are now considering, authority " ' stands upon the same footing with treaty " ' or statute. *If a right were claimed under* " ' *a treaty or statute and on looking into the* " ' *record it should appear that no such treaty* " ' *or statute existed or was in force,* it would " ' hardly be insisted that this court could re- " ' view the decision of a state court that the " ' right claimed did not exist.' This lan- " guage was used in connection with the first " clause of section 709 of the Revised Statutes " ' where is drawn in question the validity of " ' a treaty or statute of, or an authority ex- " ' ercised under, the United States, and the " ' decision is against their validity,' but it is " equally applicable to the next clause, which " covers the case under consideration, 'where " ' is drawn in question the validity of a statute " ' of, or an authority exercised under, any " ' State, on the ground of their being repug- " ' nant to the Constitution, treaties or laws " ' of the United States, and the decision is in " ' favor of their validity.'

"Applying the principle of this decision to " the present case, we think that before we " can be asked to determine whether a statute

" has impaired the obligation of a contract, *it*
" *should appear that there was a legal contract*
" *subject to impairment and some ground to*
" *believe that it has been impaired.*"

In cases of this character where this Court has held it sufficient for jurisdiction if the federal question were set up in good faith and were not wholly destitute of merit, at the least a contract has been established by sufficient allegations. Sufficient allegation of the existence of the contract is a *sine qua non* to the federal question here sought to be raised.

Illinois Central R. R. v. *Chicago, 176 U. S., 646:* Here the question was not over the existence of the contract alleged to be impaired, but whether the ordinance complained of impaired the contract. Mr. Justice BROWN speaking for the Court, said, referring to the latter question (p. 656), and again quoting from *Millingar* v. *Hartupee*:

"The claim is certainly not a frivolous one.
" In determining the existence of a federal
" question, it is only necessary to show
" that it is set up in good faith and
" is not wholly destitute of merit. Said Chief
" Justice CHASE in *Millingar* v. *Hartupee,*
" *6 Wall., 258, 261,* speaking of the valid-
" ity of an authority exercised under the
" United States: 'Something more than a
" 'bare assertion of such authority seems es-
" 'sential to the jurisdiction of this Court.
" 'The authority intended by the act is one
" 'having a real existence, derived from com-
" ' petent governmental power. If a differ-
" ' ent construction had been intended, Con-

> " ' gress would doubtless have used fitting
> " ' words. The act would have given jurisdic-
> " ' tion in cases of decisions against claims of
> " ' authority under the United States. * * *
> " ' If a right were claimed under a treaty or
> " ' statute, and, *on looking into the record, it*
> " ' *should appear that no such treaty or stat-*
> " ' *ute existed or was in force,* it would hardly
> " ' be insisted that this Court could review the
> " ' decision of a State Court that the right
> " ' claimed did not exist.' "

City Railway Co. v. *Citizens' Railroad Co., 166 U. S., 557:* Here again the fundamental contract was found to exist; and the language of the Court is to be read in the light of that finding. The only question was whether it had been impaired. Mr. Justice BROWN, speaking for the Court, said (p. 563):

> "All that is necessary to establish the jur-
> " isdiction of the Court is to show that the
> " complainant had, or claimed in good faith
> " to have, a contract with the City, which the
> " latter had attempted to impair. * * *
> " *That the complainant had a contract with*
> " *the City is entirely clear.* * * * (p. 564).
> " Whether the State had or had not impaired
> " the obligation of this contract was not a
> " question which could be properly passed
> " upon on a motion to dismiss so long as the
> " complainant claimed in its bill that it had
> " that effect and such claim was apparently
> " made in good faith, and was not a frivolous
> " one (*New Orleans* v. *New Orleans Water*
> " *Co., 142 U. S., 79, 88*)."

In no case has the force of the rule stated in the New Orleans case been impaired.

THIRD:—The appellants cite *Swafford* v. *Templeton, infra,* as holding a doctrine contrary to the rule of the New Orleans case (142 U. S., 79, *supra*). But they are in error. *Swafford* v. *Templeton* merely distinguished cases where the very subject-matter of the suit was federal—as plainly the subject-matter of this suit is not—from cases which were like this suit, where a federal question has been held to be presented in a controversy over subject-matter not federal. This is made clear by the report of the case.

Swafford v. *Templeton, 185 U. S., 487:* The plaintiff in error had sued in the Circuit Court of the United States to recover damages against the defendants for preventing his voting for a member of the National House of Representatives; and the suit was dismissed for want of jurisdiction. This Court reversed the judgment below, holding that there was jurisdiction, and saying, by Mr. Justice WHITE (p. 493):

> "The right which it was claimed had been
> " unlawfully invaded was one in the very na-
> " ture of things arising under the Constitu-
> " tion and laws of the United States, and that
> " this inhered in the very substance of the
> " claim. It is obvious, from an inspection of
> " the certificate, that the court, in dismissing
> " for want of jurisdiction, was controlled by
> " what it deemed to be the want of merit in
> " the averments which were made in the com-
> " plaint as to the violation of the federal
> " right. * * * True, it has been repeatedly
> " held that, on error from a state court to
> " this Court, where the federal question as-
> " serted to be contained in the record is man-

" ifestly lacking all color of merit, the writ " of error should be dismissed. *New Or-* " *leans Water Works Co.* v. *Louisiana, ante,* " *336 and authorities cited.* This doctrine, " however, relates to questions arising on " writs of error from State Courts where, " aside from the federal status of the parties " to the action or the inherent nature of the " federal right which is sought to be vindi- " cated, jurisdiction is to be determined by as- " certaining whether the record raises a *bona* " *fide* federal question. *In that class of cases* " *not only this Court may, but it is its duty,* " *to determine whether, in truth and in fact,* " *a real federal question arises on the record.* " And it is true, also, as observed in *New Or-* " *leans Water Works Co.* v. *Louisiana, supra,* " that a similar principle is applied in anal- " ogous cases originally brought in a Court " of the United States. *McCain* v. *Des* " *Moines, 174 U. S., 168; St. Joseph & Grand* " *Island Railroad* v. *Steele, 167 U. S., 659.* " But the doctrine referred to has no applica- " tion to a case brought in a federal court " where the very subject-matter of the con- " troversy is federal, however much wanting " in merit may be the averments which it is " claimed establish the violation of the fed- " eral right. The distinction between the " cases referred to and the one at bar is that " which must necessarily exist between con- " troversies concerning rights which are cre- " ated by the Constitution or laws of the " United States, * * * * * * the con- " tention respecting which may or may " not involve a federal question, depend- " ing upon what is the real issue to be " decided, or the substantiality of the aver- " ments as to the existence of the rights

"which it is claimed are federal in char-
"acter. The distinction finds apt illus-
"tration in the decisions of this Court hold-
"ing that suits brought by or against corpo-
"rations chartered by acts of Congress are
"cases *per se* of federal cognizance."

Wiley v. *Linkler, 179 U. S., 58:* This case also illustrates the distinction. It was here held that the federal court below had jurisdiction, this Court saying *per* Mr. Justice GRAY (p. 62):

"The right to vote for members of the Con-
"gress of the United States is not derived
"merely from the Constitution and laws of
"the State in which they are chosen, but has
"its foundation in the Constitution of the
"United States. * * * (p. 64.) This ac-
"tion is brought against election officers to
"recover damages for their rejection of the
"plaintiff's vote for a member of the House
"of Representatives of the United States.
"* * * (p. 65.) The Circuit Court, there-
"fore, clearly had jurisdiction of this ac-
"tion."

FOURTH:—It is obvious that the complainants' case falls within the second subdivision of the definition stated in *Swafford* v. *Templeton.* This is not a controversy concerning rights created by the Constitution or laws of the United States so that the controversy is in its essence federal. It is no more than a controversy "con-
"cerning rights not conferred by the Constitution
"or laws of the United States, the contention re-
"specting which may or may not involve a federal
"question, depending upon what is the real issue

" to be decided or the *substantiality of the aver-*
" *ments* as to the existence of the rights which it
" is claimed are federal in character."

II.

The allegations of the bill do not establish, or tend to establish, any contractual right of the Central Company to construct or operate a railroad in any street of New York. The allegations so clearly fail to establish any contract as to present no question for judicial consideration.

The bill alleges (p. 4) that the Central Company was organized in March, 1881, "under the so-
" called General Railroad and Tunnel Law of the
" State of New York, namely, chapter one hundred
" and forty of the laws of 1850, and the various acts
" amendatory of, and supplemental to, the same,
" and chapter five hundred and eighty-two of the
" laws of 1880." The Central Company derived its powers, therefore, from two sources:

First:—The general railroad law in force at the time of the incorporation (March, 1881); and

Secondly:—The tunnel law of 1880.

An examination of those statutes makes it plain that the Central Company did not have,—and, under them, could not have,—any contract right,

whether exclusive or not exclusive, to build or maintain a railroad in any street of the City of New York, or to prevent the State, or the defendants acting under the authority of the State, from building a rapid transit railroad for, and to be owned by, the City of New York.

III.

The Central Company acquired no contract right under the General Railroad Law.

Sect. 28 of the general railroad law in force when this company filed its articles, being chap. 140 of the laws of 1850, as amended by chap. 133 of the laws of 1880, provided that corporations formed under it should, in addition to the powers and privileges especially conferred thereby, possess "the powers conferred on corpora- " tions in the third title of the eighteenth chapter " of the first part of the Revised Statutes." The same provision is, in substance, found in sect. 1 of the general railroad law.

The provisions thus referred to in the Revised Statutes include (R. S. Pt. I. Ch. 18, T. 3, Sect. 1) the usual powers of all corporations and the special powers of stock corporations; but they do not include any power to construct railroads or any power to use the streets of a city. The right to con-

struct railroads must be found in the text of the general railroad law itself.

FIRST:—The general railroad law gave no right to build a railroad in any street of the City of New York without the consent of the City. Sect. 28 of that law prescribed the powers which every corporation formed under it should have in addition to the general powers already mentioned. Among the specific corporate powers and limitations relating to construction of railroads, was the following:

> "5. To construct their road across, along or "upon any * * * street, highway, * * * "which the route of its road shall inter- "sect or touch. * * * Nothing in this act "contained shall be construed * * * to "authorize the construction of any railroad "not already located in, upon or across any "streets in any city without the assent of the "corporation of such city."

The charter of the Central Company (pp. 36-37) set forth as the purpose of the incorporation "constructing, maintaining and operating a railroad in the City of New York and to run under certain streets specified in the charter."

Chap. 10 of the laws of 1860, which in effect amended the general railroad law provided that

> "It shall not be lawful hereafter to lay, con- "struct or operate any railroad in, upon or "along any or either of the streets or avenues "of the City of New York wherever such rail- "road may commence or end, except under the

" authority and subject to the regulations and
" restrictions which the legislature may *here-*
" *after* grant and provide."

The last mentioned statute was in effect when the Central Company took out its charter under the general railroad law. It was taken into the charter of the former City of New York as sect. 1943 of chap. 410 of the laws of 1882, and remained in force until the adoption of the charter of Greater New York, chap. 378 of the laws of 1897, by sects. 45, 72, 73 and 74, of which a scheme of local control of railroads in streets was established. Its plain effect has been stated by the Court of Appeals of the State.

Matter of Washington &c. Railroad Co., 115 N. Y., 442, per PECKHAM, *J.*, *at p. 445*:

" In regard to that city (New York) it is ad-
" mitted that the general railroad act has now
" no application, for, by chapter 10 of the Laws
" of 1860, it was made unlawful to thereafter
" lay, construct or operate a railroad in New
" York City except under the authority of the
" legislature to be thereafter granted. The
" remark of Judge Rapallo in the first cited
" case that, up to the time of the passage of
" the general surface street railroad act of
" 1884, there had been no law in force under
" which street railroads could be constructed
" except the rapid transit act, the general rail-
" road act of 1850, being inapplicable to street
" railways in cities, was not exactly accurate
" if applied to all the cities in the state, but was
" in entire accord with the truth in regard to
" the particular city (New York) which he
" was writing about and in which the corpora-

"tion existed whose rights were then under "review. * * * In the last case cited the "question was not in issue, and the remark "was a general one that the act of 1850, gives "no authority for the construction of street "railroads, and if it were limited to New "York City (by reason of the passage "of the act of 1860) it is certainly a correct "statement of the fact."

SECOND:—It is thus clear that under both the act of 1860, and subd. 5 of sect. 28 of the general railroad law of 1850, there could be no right to build a railroad without the consent of the corporation of the City; and no such consent is here alleged.

But beyond the statute was the constitution itself of the State requiring the consent of the local authorities and of a majority in value of abutting owners (or, in lieu of the latter, the substituted consent of the Supreme Court of the State). By the amendment adopted in 1874 (art. 3, sect. 18) there was adopted the following provision, which was continued in the new Constitution of 1894:

"No law shall authorize the construction or "operation of a street railroad except upon "the condition that the consent of the owners "of one-half in value of the property bound-"ed on and the consent also of the local au-"thorities having the control of that portion "of the street or highway upon which it is "proposed to construct or operate such rail-"road, be first obtained; or in case the "consent of such property owners cannot be "obtained, the General Term" (changed in 1894 to Appellate Division) "of the Supreme

" Court in the department in which it is pro-
" posed to be constructed may upon applica-
" tion appoint three commissioners, who shall
" determine, after a hearing of all parties in-
" terested, whether such railroad ought to be
" constructed or operated; and their deter-
" mination confirmed by the court may be
" taken in lieu of the consent of the property
" owners."

People v. *O'Brien*, 111 N. Y., 1, per RUGER, *C. J.*, at page 30:

" By such incorporation the company be-
" came an artificial being, endowed with ca-
" pacity to acquire and hold such rights and
" property, both real and personal, as were
" necessary to enable it to transact the busi-
" ness for which it was created, and allowed
" to mortgage its franchises as security for
" loans made to it, *but having no present au-*
" *thority to construct or operate a railroad up-*
" *on the streets of any municipality.* This
" right, under the Constitution, could be ac-
" quired only from the City authorities, and
" they could grant or refuse it at their pleas-
" ure. The Constitution not only made the con-
" sent of the municipal authorities indispensa-
" ble to the creation of such a right, but, by im-
" plication, conferred authority upon them
" to grant the consent, upon such terms and
" conditions as they chose to impose, and
" upon the corporation the right to acquire
" it by purchase. The framers of the Consti-
" tution, evidently treating the privilege as a
" valuable one, which should be disposed of
" for the benefit of the municipality, to those
" who would pay the highest price for it, gave
" the municipal authorities the exclusive

"right to grant the privilege, which had "theretofore been exercised by the legisla- "ture alone, and authorized its acquisition by "contract from such municipality."

Schaper v. Brooklyn, &c., Railway Co., 4 St. Rep., 860. The Supreme Court of the State here said, per BARTLETT, *J.*:

"Of itself the general railroad act con- "fers no authority upon any company "formed thereunder to build in a city street. "It expressly provides that nothing therein "contained shall be construed to authorize "the construction of any railroad not al- "ready located in, upon or across any streets "in any city without the assent of the corpo- "ration of such city. (Laws of 1850, chap. "140, §28, subd. 5, amended by laws 1880, "chap. 133, but unchanged in this respect "so far as the construction of its rail- "road in a city is concerned. Therefore "a corporation organized under this act ac- "quires only the privilege of applying to the "municipal corporation for permission to "build in or across particular streets. If "this permission is not granted by the City, "the road cannot be built there. *Under the "statute the municipal authorities become "the proximate source of power from which "the right to construct a railway in the street "must be obtained.*"

THIRD:—The constitutional provision strictly applied to a railroad under streets. Such a railroad is a "street railroad."

Matter of New York District Railway Company, 107 N. Y., 42: Referring to the tunnel stat-

ute, chap. 582 of the Laws of 1880, under which, as well as under the general railroad law, the complainants claim the right of the Central Company arose, the court said, per FINCH, *J.* (p. 50):

"We have reached the conclusion that the "act authorizes and regulates underground "street railways in a city or village and that "the appellants' road is such a rail-"way. * * * (p. 51.) The legislature "seems to have deemed it wise to make the "underground road a part of the streets and "its operation a street use, by direct enact-"ment. * * * (p. 52.) Not merely is the "easement of the public affected temporarily "by the process of construction, but perma-"nently by changing wholly the support of "that surface. We have often held that the "right of the public in the streets of a city "extends to and embraces, besides the sup-"port of the surface, the necessary sewerage "and room for water and gas pipes and the "like; and the right to lay and maintain these "is an important part of the public ease-"ment. * * * When the work is all "done the street will consist of two stories "or surfaces, one carrying the ordinary traf-"fic and movement lessened by so much as "is diverted to the swifter transit to the "other, and both together will do what one "alone did to the extent of its capacity.

"Such a road is to be deemed a street rail-"way, not only because it subserves street "purposes and reaps the benefit of street "easements, and occupies and modifies the "street surface, but also because it is fully "within the mischiefs which the constitu-"tional provision was designed to redress "and prevent. * * * (p. 52.) Where the

" railway runs under the streets, the adjoin-
" ing owners are as much and as dangerously
" affected as where it runs on their surface
" or above them. Whether the new surface
" is safe and sufficient, or weak and perilous,
" and invites or frightens away passage;
" whether the openings obstruct or hinder ac-
" cess to the abutter or pour out through the
" ventilators smoke and steam upon his
" premises; whether his vaults and founda-
" tions will remain safe and secure, or be
" undermined or weakened by vibration;
" whether his gas and water supply will con-
" tinue ample and convenient, and the new
" sewerage work him no injury; all these are
" to him questions of vital importance, affect-
" ing his comfort and convenience, the suc-
" cess of his business and the value of his
" property. The same reasons which dic-
" tated a constitutional protection against
" roads, on or above the surface of the
" streets, apply to those which are built be-
" neath in the manner here contemplated, and
" these should justly be deemed street rail-
" roads within the meaning of that phrase as
" used in the Constitution."

FOURTH:—The complainants argue in their bill and elaborately in their brief before this Court, that the filing by the Central Company on 28th March, 1882, of a map and profile of the route, duly signed and certified by its president and engineer and by a majority of its board of directors, gave the Central Company some contract right. Sect. 22 of the railroad law (p. 221 of the laws of 1850) provided for the filing of such map and profile; but the act did not contain, nor do the appellants

quote, any provision which grants to the company any right by reason of such filing. The filing was simply made a necessary condition under sect. 14 of the act to any condemnation of right of way. The general grant of power contained in sect. 28 included a right "to lay out its road not exceeding six rods in width" and the right already mentioned (subd. 5 of sect. 28) to construct the road along water courses and highways was subject to the prohibition of the construction of any railroad in, upon or across any streets of a city without the assent of the city corporation.

The courts of New York have, however, as between rival railroad corporations, adjudged that the company which has first filed its map and profile gets under the general law a prior right as against any corporation thereafter filing a map and profile. The appellants wrench some phrases in opinions from the facts of the cases; and they insist that the mere filing of a map and profile by a company incorporated under the general railroad law gave it an exclusive right not only as against other corporations, but as against the State to the occupation of the space included in such map and profile. Since the incorporation of a railroad company and the filing of its map and profile are proceedings absolutely within the control of private persons,—requiring the assent of no public officers (the function of the Secretary of State, register or clerk who receives the papers being merely ministerial) it would follow, if the appellants were right, that in this easy way, and practically without cost, any body of private citi-

zens numerous enough to constitute the incorporators and directors of a railroad company, might appropriate the most valuable streets of any city of the State. If the emphatic assertions of the complainants' bill could raise an apprehension that so intolerable a danger existed, it would be set at rest by examination of undoubted authorities.

The appellants' counsel cite *Rochester, &c.*, v. *N. Y., L. E. & Western R. R. Co., 44 Hun, 206*, where the General Term of the Supreme Court said that (p. 210).

> "Under the general railroad act, when a corporation has been organized in compliance with the conditions of the statute, and has made a map and profile of the route intended to be adopted by the Company duly certified and filed as required by the twenty-second section, it has acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted."

They cite what the Court of Appeals said in the same case (110 N. Y., 128), per GRAY, *J.* (p. 133), as follows:

> "Clearly there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the Company thereafter to construct thereon. * * *
> "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of

> " its road, and has given the required notice
> " to all persons affected by such construction,
> " and no change of route is made, as the result
> " of any proceeding instituted by any land
> " owner or occupant in our judgment it has
> " acquired the right to construct and operate
> " a railroad upon such line; exclusive in that
> " respect as to all other railroad corporations
> " and free from the interference of any party.
> " By its proceeding it has impressed upon the
> " lands a lien in favor of its right to construct,
> " which ripens into title through purchase or
> " condemnation proceedings."

They also cite other cases (*pp.* 53-4 of their brief) showing that priority in filing a map gives priority in right. But the most casual inspection of these authorities shows that the doctrine held was that, as between the company which had first taken the proceedings and a company later taking like proceedings, priority of right belonged to priority of time. Nothing has been held adverse to the right of the State to use the routes for its own purposes or to authorize their use for another railroad; but that very right of the State has been held by the Court of Appeals.

People v. *Adirondack Co., 160 N. Y., 225, affirmed in this Court, 176 U. S., 335:* There a railroad corporation sought to extend its line of railroad by filing a map and profile of the extension and serving notice on the occupants of certain land included in the proposed extension which, before the Company had begun condemnation proceedings, was taken as part of the forest preserve of the State. The railway company claimed that, by fil-

ing its map and profile, it had acquired a lien upon the land which could not be affected by a subsequent proceeding by the Forestry Commission of the State to acquire the land. The corporation cited in behalf of its contention the same authorities upon which the appellants here rely. The Court of Appeals held, however, that no such lien was acquired against the State and that, assuming that anything of the character of a lien was acquired by filing the map and profile, it was created by statute and not by contract and that for any interference with it by the State there was no right to compensation unless some vested right had accrued under it. Referring to the claim that a right as against the State had been acquired by the simple filing of a map, the Court said (160 N. Y., pp. 245-247) per VANN, *J.*:

> "As there is no language expressly "giving it that effect in the nature of "things, the Legislature did not intend "to clothe a creature of the State with "the right to hold up the paramount "power, and compel it to pay money "for the bare filing of a map, which is not the "commencement of condemnation proceed-"ings, for it is filed under the Railroad Law, "while condemnation is had under the Code "of Civil Procedure. * * * The effect of "the map when filed was to give warning to "other railroads that a certain route had been "pre-empted by the defendant. It established "no right against the owner, because the Con-"stitution forbids it; it established none "against the State, because its power is para-"mount, but as against all other railroad com-

" panies, and as against all other creatures
" of the State empowered to use the right of
" eminent domain, it gave the exclusive right
" to occupy the particular strip of land for
" railroad purposes *until the Legislature au-*
" *thorized it to be devoted to some other pub-*
" *lic use.*"

" The general language used in certain cases
" relied upon by the defendant should be read
" in the light of the facts then before the Court
" (*Rochester H. & L. R. R. Co.* v. *N. Y., L. E.*
" *& W. R. R. Co., 110 N. Y., 128; Suburban*
" *Rapid Transit Co.* v. *Mayor, &c., 128 N. Y.,*
" *510*). These cases simply involve controver-
" sies between corporations created by the
" State as to a located line, the legislation nec-
" essary to enable one corporation to condemn
" land previously condemned by another and
" the like. The State was not a party to any of
" them and the only question involved was as
" to which corporation was ahead. The so-
" called lien was simply an exclusive right of
" one of two contending railroad corporations,
" as against the other, to build a road on a
" certain piece of land, or of a railroad corpo-
" ration to hold land already condemned for a
" public use, as against a city seeking to con-
" demn it for another public use, without spe-
" cial authority from the Legislature. * * *
" Here the question arises between the State
" and one of its creatures, and the claim that
" a lien good as against the creator of the cor-
" poration, was placed upon the land simply
" by the grant of a franchise to exist as the cor-
" poration in order to build the road, followed
" by the filing of a map of the proposed route
" and notice thereof to the occupants, but by
" nothing else, cannot be sustained. There is
" no property in a naked railroad route, exist-

" ing on paper only, that the State is obliged
" to pay for when it needs the land covered by
" that route for a great public use, and its
" officers are authorized to act by appropri-
" ate legislation."

Upon the affirmance of the case here, the Court said, per FULLER, *C. J.*, (176 U. S., 345, 346, 350):

" But the capacity to acquire land by con-
" demnation for the construction of a rail-
" road attends the franchise to be a railroad
" corporation, and when unexecuted cannot
" be held to be in itself a vested right sur-
" viving the existence of the franchise or an
" authorized circumscription of its scope.
" * * *

" In arriving at these conclusions the Court
" of Appeals was construing and applying
" the laws of the State of New York, and we
" perceive no adequate ground for declining
" to accept its views in accordance with the
" general rule on that subject. * * *

" We agree with the Court of Appeals, as
" has already been indicated, that the rail-
" road company occupies no position entitling
" it to raise the question. The steps it had
" taken had not culminated in the acquisition
" of any property or vested right."

Suburban Rapid Transit Co. v. *Mayor, 128 N. Y., 510:* This case is also cited for the appellants, but quite without justification. It was considered by the Court of Appeals in the *Adirondack* case just quoted, and in no way conflicts with the latter. Instead of supporting appellants' proposition, it illustrates the reverse of that proposition.

Under the former rapid transit act of New York (chap. 606 of the laws of 1875) the former rapid transit board had determined upon certain routes. After its determination was complete, the necessary consents of the local authorities and of abutting owners were obtained; and subsequently, by condemnation proceedings under the statute, the company duly acquired the right to a strip through private lands over which one of the routes had been located (128 N. Y., *p.* 514). After the right of the company has been thus created and established, the City of New York sought, for a park, to take from the company the particular piece of land which it had acquired by condemnation. The Court of Appeals held that, when the route or routes had been located with the consent of the municipal authorities and of the property owners and in the manner prescribed by the rapid transit act which authorize the construction of railroads in, under or over the streets, the company acquired an (p. 520)

> " absolute and exclusive franchise to build
> " upon the route located for it and to the
> " use of which the lands were devoted
> " through the exercise of the paramount
> " right of sovereign power, which fran-
> " chise was unimpaired with respect to the
> " right to take and use the land in question
> " by the fact that the work of actual construc-
> " tion had not reached it at the time the legis-
> " lature passed the act for the new parks."

If there were any inconsistency between this case and the Adirondack case, the latter case as the later expressions of the court must pre-

vail. But there was no inconsistency. The proposition which the earlier case affirms was that the claim of the City to subject to another public use for the City lands already and completely dedicated to a public use, was not authorized by legislation of that explicit character necessary to sustain a condemnation of property already dedicated to a public purpose. The court merely applied the rule stated by the same court in *Re New York, L. & W. R. Co., 99 N. Y., 12, at p. 23* per FINCH, *J.*:

> "It could not be intended that the State, " having authorized one taking whereby the " land became impressed under authority of " the sovereign with the public use, meant to " nullify its own grant by authority to an- " other corporation to take them again for " another public use unless it so specifically " decreed, it has been ruled that lands so held " and impressed with a public trust were not " embraced in words of general authority."
>
> Matter of City of Buffalo, 68 N. Y., 167.
> Matter of Boston, &c., Railway Co., 79 N. Y., 669.

The court in the Suburban Rapid Transit Company case pointed out the inchoate character of the right acquired under the general railroad law and distinguished it from the right acquired under the rapid transit act by the assent of the local authorities and abutting owners, saying per GRAY, *J.*, (128 N. Y., p. 518):

> " With the ordinary railroad company " formed under the general railroad act, the " enterprise as to the construction and oper-

" ation is inchoate after it is erected into a " corporation whereas the corporation which " is erected under the rapid transit act com- " mences its existence and operations with " everything planned and, except in details, " perfected. Its line of road is located and " the streets, places or lands over which it is " defined by the commissioners are im- " pressed with a public use and are dedicated " to the purposes and uses of the corporation " to be organized. * * * (p. 519.) The " right which the plaintiff acquired to con- " struct and operate the railroad upon the " route described in its articles of associa- " tion lacked nothing for its efficacy or com- " pleteness. It had become an obligation and " was one of the unalterable conditions and " a fixed public feature of the corporate ex- " istence. *When to it were subsequently* " *added the consents of municipal authorities* " *and of property owners, was any feature* " *wanting to the fullest franchise in such re-* " *spects?*"

Even in that case the New York court refused to hold that the company acquired any *contract* right as against the State, for it said, per GRAY, *J.*, at p. 521:

" The articles of association under which " this corporation was formed, were its char- " ter with the State, and though a deprива- " tion of the franchises granted may be with- " in the power of the legislature to authorize " if some public necessity should demand it, " we should not deem that power exerted, in " the absence of some unequivocal expression " of the legislative intent."

FIFTH:—If the Central Company acquired by incorporation under the general railroad law any actual right to construct a railroad, the right had terminated long before the filing of the bill. The bill affirmatively showed that, when it was filed on 9th July, 1901, the Central Company and its successors in interest had neither finished its road nor begun its construction for more than eighteen years after its articles of association were filed and recorded (pp. 4, 8). Sect. 47 of the general railroad law provided that

> "If any corporation formed under this act "shall not, within five years after its articles "of association are filed and recorded in the "office of the Secretary of State, begin the "construction of its road and expend thereon "ten per cent. of the amount of its capital or "shall not finish its road or put it in opera- "tion within seven years from the time of "filing its articles of association as afore- "said, *its corporate existence and powers shall* "*cease.*"

Inasmuch as, under this law, a railroad corporation, filing its map and profile, obtained a prior right against any other later competitor terminable only by express legislation,—it was obviously necessary that the law should enforce diligence upon the company first acquiring priority that it should not play the dog in the manger. Therefore the statute prescribed time limits. For the same reason it was necessary that the corporate powers should end without intervention by the attorney-general or other suit by the State. So

far as the mere acts of incorporation and of filing a map should give priority,—other and more diligent competitors, if the privileges were not availed of, should not be delayed for longer periods than the five and seven years. Therefore it is that the court of last resort of the State has held this act to be self executory. It needs no action or judicial proceeding to declare and complete a forfeiture of a corporate existence and powers where the corporation has failed to act for the very ample periods provided by the statute. There is no question of forfeiture, but of a limit of time on a corporate right.

Re Brooklyn, Winfield & Newtown R. R. Co., 72 N. Y., 245.

Re Brooklyn, &c., R. R. Co., 75 N. Y., 335.

Brooklyn Steam Transit Co. v. *Brooklyn, 78 N. Y., 524.*

In the first two of these cases the Court of Appeals dealt with the very provision of the general railroad law here under consideration. There was no dissent in either case. In the first the Court said, per ALLEN, *J.* (72 N. Y., p. 249):

> "The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use. * * * It needed no action or judicial procedure to declare or complete a forfeiture of the charter and loss of corporate powers. The statute executed itself, and the non-existence of the corporation could be alleged in opposition to this application."

In the second case, the Court, referring to the first case, said, per ANDREWS, *J.* (75 N. Y., 357):

> "This Court * * * recognized the "general principle that a corporation by "omitting to perform a duty imposed by its "charter, or to comply with its provisions, "does not *ipso facto* lose its corporate char- "acter, or cease to be a corporation, but "simply exposes itself to the hazard of being "deprived of its corporate character and "franchises by the judgment of the Court in "an action instituted for that purpose by the "Attorney-General in behalf of the people. "But while affirming this general proposi- "tion the Court held that by force of Sect. "47 of the general railroad act * * * "the corporate existence of the petitioner ab- "solutely terminated."

This interpretation of the general railroad law by the highest judicial authority of the State was made in 1878, years before the Central Company was incorporated.

The Appellants cite cases in other jurisdictions or cases in New York where the provision is expressly for forfeiture. But nothing has impaired or raised a doubt as to the good sense, necessity and existence of the rule for New York, as the Court of Appeals established it. Even in much later cases where other statutory language has been held to have other meaning, the binding force of the decisions has been recognized.

Matter of Brooklyn El. R. R. Co., 125 N. Y., 434, at p. 441.
Matter of New York & Long Island Bridge Co., 148 N. Y., 540, at p. 547.

In the first of these cases, the Court, referring to the cases, decided in 1891, above cited from *72 N. Y.*, and *78 N. Y.*, said, per EARL, *J.*, (125 N. Y., 441):

> " We held that this clear and emphatic lan-
> " guage indicated a legislative intent that the
> " corporate life should, for the defaults men-
> " tioned, come to an end, and not merely be
> " exposed to forfeiture by proceedings on be-
> " half of the State. These decisions, we
> " think, stand well upon reason."

Such construction of the general railroad law of New York having been made by its court of last resort before any right accrued to the Central Company, it will be followed by this Court.

> *Adams Express Co.* v. *Ohio, 165 U. S., 194, per* FULLER, *C. J., at p. 219.*
> *Vide* numerous other authorities cited in Foster's Federal Practice, 3rd ed., sect. 375, at pp. 881, 882.

The Central Company, claiming under the general railroad act of 1850, could not get more than that law gave it. And the right or, rather, the priority, which that law gave to a railroad company, was limited to certain periods unless within those periods the railroad should be begun and constructed and completed. If the law made a contract, the limitations prescribed by the law were a part of the contract.

IV.

Neither the municipal authorities nor the abutting property owners (nor in lieu of such property owners, the Supreme Court of the State) have consented to the construction of the proposed railroad of the Central Company.

The Appellant's bill itself recognized the necessity to a valid franchise in the Central Company that there should be these constitutional and statutory consents; and the Appellants argue that the consent given by such authorities to the *municipal* rapid transit railroad now under construction by the defendants and the construction of which is in this very suit sought to be enjoined, inures to the benefit of the railroad of the Central Company. The claim hardly seems serious; and we find difficulty in treating it with respect.

The allegations of the bill at p. 28 are that

> " the plans and specifications thus adopted
> " by said Board (the Rapid Transit Board, for
> " purposes of municipal construction) * * *
> " were *substantially the same* plans and spec-
> " ifications for an underground railway upon
> " said route that had previously been adopted
> " and projected for the construction of the
> " railroad and tunnel of the Central Tunnel
> " Railway Company and of your orators.
> " The Common Council, the Mayor and the
> " local authorities of the City of New York,

" in accordance with the provisions of the con-
" stitution of the State of New York
" and in accordance with the provisions
" of said rapid transit act, have duly
" given their consent to the construction of *an*
" underground railroad and tunnel upon the
" route specified in the articles of association
" and said maps of the said Central Tunnel
" Railway Company and of your orators.
" The Appellate Division of the Supreme
" Court for the First Department has, upon
" the application of said Rapid Transit Board,
" made in accordance with and under color
" of said rapid transit act, appointed three
" commissioners to determine after a hearing
" of all parties interested whether *an* under-
" ground railroad and tunnel ought to be con-
" structed and operated upon the route spec-
" ified in the articles of association and said
" maps of the said Central Tunnel Railway
" Company and of your orators. Said Commis-
" sioners after duly hearing all parties inter-
" ested in accordance with the said constitution
" and the said rapid transit act, have duly de-
" termined that *such* a railroad and tunnel
" should be constructed and operated upon
" said route. Their determination, in accord-
" ance with said constitution *and the said rap-*
" *id transit act* has been duly approved by the
" said court and has been taken in lieu of the
" consent of the property owners of property
" bounding upon said route. The date of the
" approval of said court was on or about April
" 6, 1898."

The complainants,—having thus alleged the proceedings of the defendant Rapid Transit Board and of the local authorities for a construction of the mu-

nicipal railroad of the City under the rapid transit act, and having failed (for notorious truth would not permit them) to assert that the constitutional consents had been given *to the Central Company or to any of the rights claimed for it*,—they nevertheless saw fit in their bill, referring to the order procured by the defendant Rapid Transit Board, to add the following (p. 28):

> "Thereupon by the entry of such order said "Appellate Division perfected and confirmed, "as your orators are informed and believe, "the right *of your orators* and the exclusive "franchise of your orators to construct a "street railroad and tunnel upon said route."

It is impossible to argue upon this seriously. We can only ask the Court to look at the record, bearing in mind the old and familiar rule that doubts arising on the face of a pleading are to be resolved against the pleader (*Phelps* v. *McDonald*, 99 U. S., 298, per SWAYNE, *J.*, at p. 305). The bill itself set out the scheme of municipal construction. It set out the provisions for a rapid transit board (p. 15), for the submission to the electors of the City of the question whether there should be municipal construction of railroads (p. 15), for the power of that board, in case the majority vote favored municipal construction, to grant (subject to the constitutional consents) the right to maintain and operate the municipal railroad for not less than thirty-five years nor more than fifty years (p. 15), for the advance by the City of the funds to construct the railroad, for the borrowing of money and issuing of bonds to provide the

moneys (p. 15), for the laying out of the routes and the adoption of the plan of construction by the Rapid Transit Board, for the requisite consent of the local authorities consisting of the Mayor and Common Council, and of a majority in value of the abutting owners (or in lieu thereof of the Supreme Court of the State), for the various steps of procedure after the popular vote in favor of municipal construction (pp. 15-16), and for details of the contract for the construction and operation of the municipal road (pp. 17-18).

Rapid Transit Act, chap. 4 of the laws of 1891, as amended and especially as amended by chap. 752 of the laws of 1894,—the latter amendment providing for the municipal construction.

The Appellants' bill presented portions of the proceedings of the defendant Rapid Transit Board taken to carry out the statutory popular mandate for municipal construction. The bill cited the opinions of the judges of the Appellate Division of the Supreme Court upon the application of the Board (pp. 21-25).

Re Rapid Transit Railroad Commissioners, 5 App. Div., 290.
Second application of same Board, 23 App. Div., 472.

The court below and this Court, having been thus introduced by the bill to the procedure of the defendants, the bill specifically alleged (p. 28) that, "under color of said rapid transit act the

"said Board" had "determined upon the con-
"struction of an underground railroad in the
"City of New York upon the routes specified in
"the articles of association and said maps of the
"said Central Tunnel Railway Company;" that
the local authorities "in accordance with the pro-
"visions of said rapid transit act" had "duly
"given their consent to the construction of **an**
"underground railroad and tunnel;" and that the
"Appellate Division of the Supreme Court for
"the First Department" had, "upon the applica-
"tion of said Rapid Transit Board, made, in ac-
"cordance with and under color of said rapid
"transit act, appointed three commissioners to
"determine * * * whether **an** underground
"railroad and tunnel ought to be constructed and
"operated;" that "said commissioners" had
"duly determined that **such a** railroad and tun-
"nel should be constructed and operated;" and
"that their determination in accordance with such
"constitution and the said rapid transit act" had
"been duly approved by the said Court and" had
"been taken in lieu of the consent of the property
"owners."

It is thus plain upon the face of the bill, and beyond any possible discussion, that the only consent given by the municipal authorities, or by the Supreme Court in lieu of the property owners, has been given to the municipal construction here sought to be enjoined. The assertions of the bill that the determination and consents in favor of the municipal construction authorized the railroad of the Central Company, because that rail-

road occupied the same route, or a part of it, and was "an" underground railroad is, we submit, little less than audacious trifling. The fact remains upon the face of the bill that the consent absolutely necessary to the validity of the railroad of the Central Company has *not* been given by either the local authorities or by the property owners, or by the Supreme Court of the State acting in lieu of the property owners.

V.

The Central Company acquired no right under the tunnel law, chapter 582 of the Laws of 1880.

The portion of the bill which deals with the claim under this act is little less than amazing.

The Central Company is alleged to have been incorporated under the tunnel law as well as under the general railroad law (p. 4). Sect. 1 of the tunnel law is alleged (p. 5) to have provided that

> "whenever, according to the route and
> " plans adopted by any railroad company
> " * * * under chapter one hundred and
> " forty of the laws of eighteen hundred and
> " fifty" (the general railroad law), "it shall
> " be necessary or proper to build said road or
> " any part of the same underground * * *
> " it shall be lawful for said company to enter
> " upon and acquire title to and use such lands

> " * * * as shall be necessary for purposes
> " herein mentioned, and they shall have the
> " power to construct, erect and secure the
> " necessary foundations and other struc-
> " tures."

The same section provided, as set out in the bill (p. 5), that the consent of abutting owners and municipal authorities should be had or, if they could not be had, then that application might be made to the General Term of the Supreme Court for the appointment of commissioners who should determine whether the railroad ought to be built and that

> "the determination by said commissioners
> " confirmed by the court may be taken in lieu
> " of said authorities and property owners."

Such is the statute set forth in the bill. Such allegations, one might suppose, would be introductory to an allegation that the consents *had* been obtained, or, if not, that the substituted consent of the Supreme Court *had* been accorded. But instead, *the bill sets forth that none of these consents had been obtained.* The complainants gravely alleged that "on account of the prejudice then " existing among the inhabitants and property " owners of the City of New York" (p. 6) the Central Company was unable to obtain the statutory consents of the municipal authorities and abutting owners, and thereupon applied to the supreme court for the appointment of commissioners; that that court appointed commissioners, one of whom declined to serve; that application

was then made by the Central Company to the court for appointment of another commissioner to fill the vacancy; that the court thereupon appointed another commissioner; that he declined to serve; that the Central Company thereupon applied to the court for the appointment of a third commissioner (p. 7); that "said application was "duly granted by said court;" but that the court failed to make an order appointing the new commissioner. The bill then alleged (p. 8) that

> "In consequence of said inaction of the said "General Term and of its said successor" (meaning the Appellate Division of the Supreme Court constituted by the Constitution of 1894) "proceedings before said com- "missioners have been necessarily suspend- "ed; and the said Central Tunnel Railway "Company has not and its successor, your "orator, the Underground Railroad of the "City of New York, has not been able to con- "tinue the proceedings before said commis- "sioners; and neither of said corporations "has been able to commence the construction "of its line of railroad."

The bill charged inaction and even laches (pp. 7-8) upon the Supreme Court. For, having thus alleged the failure of the Central Company to obtain the consents prescribed by the Tunnel statute, the bill proceeded to allege (p. 8) "that by "the aforesaid proceedings,"—that is to say, by an application to the Supreme Court which failed,

> "the said Central Railway Company has "acquired a vested and exclusive right and "an exclusive franchise and an exclusive ease-

" ment for the construction of a tunnel and an
" underground railroad over the route spec-
" ified."

We venture to deem it unnecessary to submit any argument upon this portion of the Appellant's claim. The statement is sufficient. It may, however, be added that the obvious reason why the Supreme Court of the State refused to permit the proceeding under the statute to go on, was that the Tunnel law was found to be unconstitutional. The very same General Term to which the Central Company made its application so adjudged it in October, 1886.

Matter of New York District R. R. Co.,
42 Hun, 621.

The ground of the unconstitutionality was that, —while the constitution absolutely required the consent of the municipal authorities, and did not provide any substituted consent of the Supreme Court therefor as it did in the case of non-assenting abutting property owners,—the statute, in defiance of the constitution, undertook to provide for such substituted consent in the case of refusal by the municipal authorities. The decision of the General Term was affirmed in the Court of Appeals in the report next cited.

Matter of New York District R. R. Co., 107 N. Y., 42, cited supra: The petitioner corporation, claiming under the Tunnel law being unable to obtain the consent of abutting owners, applied to the Supreme Court for the appointment of commission-

ers under the tunnel act. The Supreme Court denied the application on the ground that the act was unconstitutional, the court saying per FINCH, *J.* (p. 50):

> "The company's counsel argue that it gets "its authority for the construction and operation of its underground road not from the "Act of 1880, but from the General Act of "1850, under which it was organized. But that "act, as we have held, has no application to "street railroads (N. Y. Cable Co. *v.* Mayor, &c., "104 N. Y., 1), and if it had, the Act of 1860, "Chapter 10, takes away the authority so conferred, for it provides that 'it shall not be "'lawful hereafter to lay, construct or operate "'any railroad in, upon or along any or either "'of the streets or avenues of the City of "'New York, wherever such railroad shall "'commence or end, except under the authority and subject to the regulations and restrictions which the Legislature may hereafter grant and provide.' Having held "that appellant's road is a street railway, and "shown that it is planned to be built in and "along the city streets, it follows that it has "and can have no authority to construct its "proposed road under the Act of 1850; and if "it does not get it under the Act of 1880, it has "no authority at all and no standing before the "Court. I think that the truth may be that the "appellant derived its corporate existence "from the Act of 1850, but certainly not its "right to construct its contemplated road; and "that such right could only come from the rapid transit act, or the act of 1880, and that the "latter is an act which authorizes the construction and operation of a street railway, and "so is within the constitutional provision."

It was further argued that only so much of the tunnel act was invalid as made the order of the Supreme Court stand for the consent of the municipal authorities and that the portion of the act providing for an order in lieu of the consent of the property owners alone was valid. The Court of Appeals rejected the contention, further saying per FINCH, *J.* (p. 54):

> " The order when made is a single thing
> " which must have the statute effect or none.
> " * * * The Legislature has declared that
> " when made it shall stand for two things.
> " We are asked to say that it shall not, but
> " only for one. If we do that we invade the
> " domain of the Legislature; we change its
> " mandate as to the effect of the order; it
> " ceases to be the order authorized and be-
> " comes another and different one. * * *
> " Very possibly, the act may stand as an au-
> " thority for the construction of an under-
> " ground street railway upon the condition of
> " the assent of the city authorities and the half
> " of abutting values, and rejecting all the pro-
> " visions for the appointment of commission-
> " ers, whose order shall be a substitute. Fur-
> " ther than that we do not deem it our duty
> " to go."

VI.

Apart from the claim derived by the complainants through the Central Company and already dealt with in this brief, the bill below alleged no right in either appellant to construct or maintain a railroad under the streets of New York.

THE UNDERGROUND COMPANY:— This company was formed by the consolidation of the Central Company with two other companies, in behalf of neither of which any claim is made. The consolidation is alleged to have taken place under the Railroad Law of New York (which succeeded and substantially included the general railroad act of 1850, discussed above), being chap. 39 of the General Laws of the State, or chap. 676 of the laws of 1892. Sect. 16 of that statute (laws of 1892, p. 1388) provided that

> "When, according to the route and plan "for the building of its road adopted by any "railroad corporation hereafter incorpor- "ated, it shall be necessary or proper to "build it or any part of it underground * * * "such road or any part of it may be built "within the limits of any city * * * "and may run by means of a tunnel under- "neath any of the streets, roads or public "places thereof," and further that "such "corporation shall, before constructing the "same underneath any such street, road or

"public place, have obtained the consent of
"the owners of one-half in value of the prop-
"erty bounded on the line of such street,
"road or public place and the consent * * *
"of the proper authorities of the City having
"control of such streets, roads or public
"places. If the consent of such property
"owners cannot be obtained, the General
"Term of the Supreme Court * * *
"may upon application appoint three com-
"missioners who shall determine * * *
"whether such railroad ought to be built un-
"derneath such streets * * * and the de-
"termination of the commissioners confirmed
"by the Court may be taken in lieu of the con-
"sent of the property owners."

There is no allegation that the Underground Road obtained the consent either of the "proper "authorities of the City" or of the property owners or of the General Term of the Supreme Court. The claim,—coming measurably near to frivolity,—that the consents given to the municipal rapid transit railroad could be availed of by appellants has been sufficiently discussed (*supra*, pp. 41-46).

The only rights claimed to belong to the Underground Company in addition to those derived from the Central Company are stated in the bill at pp. 10-12 as consisting of:

(*a*) A right arising through the payment by that Company of a tax of one-eighth of one per cent. of its capital stock on or about 21st August, 1896, at the time its articles of consolidation and incorporation were filed; and

(*b*) A right created or arising through the filing of a map or profile on or about 10th June, 1897.

(*a*) The Underground Company paid its incorporation or organizing tax under the Tax Law of the State, sect. 180 of chap. 908 of the laws of 1896, referred to in the bill of complaint, which provided that

> "Every stock corporation incorporated "under any law of this State shall pay to the "state treasurer a tax of one-eighth of one "per centum upon the amount of capital stock "which the corporation is authorized to have "and a like tax upon any subsequent in- "crease. Such tax shall be due and payable "upon the incorporation of such corporation "or upon the increase of its capital stock. "* * * In case of the consolidation of ex- "isting corporations into a corporation, "such new corporation shall be required to "pay the tax hereinbefore provided for only "upon the amount of its capital stock "in excess of the aggregate amount of capital "stock of said corporations."

It is not open to any argument that the payment of such tax for the mere privilege of being a corporation did not give, or begin to give, any right to the Underground Company to occupy with its proposed railroad any street of the City of New York. The Tax Law contained not a word justifying such a pretence.

(*b*) We have already sufficiently discussed the

character of the right or claim created by the filing of the map and profile.

It is proper to add that the Underground Company was, according to the bill, incorporated in August, 1896, more than two years after the amendment of 1894 to the rapid transit act; and that it is under such amendment of 1894 that the defendants are constructing the municipal rapid transit railroad of the City here sought to be enjoined.

THE COMPLAINANT RAPID TRANSIT COMPANY.— What has been said with respect to the Central and Underground Companies applies also to this company. And we may add that, as in the case of the Underground Company, its incorporation in April, 1897, was strictly subject to the rapid transit law of the State. It was strictly subject to the railroad law (chap. 39 of the general laws) under which it was incorporated and under which it could get no right to construct a railroad under the street, except by obtaining the consent of the municipal authorities and the abutting property owners or, in lieu of the latter consent, the substituted consent of the Supreme Court.

The bill alleges that the payment of $125, the incorporation tax of ⅛ of 1 per cent. upon the capital stock made by this Company on 10th April, 1897, was accepted by the Treasurer of the State (p. 13)

> " as full payment of the tax and considera-
> " tion for the privilege of the organization

"of your said orator and for the construc-
"tion and operation of a railroad upon the
"routes specified in its said certificate of in-
"corporation and for the privilege of exercis-
"ing all its franchises in pursuance of chap-
"ter 908 of the laws of the State of New York
"approved in the year 1896 and the other laws
"of the State of New York *and thereby and*
"*thereupon the State of New York entered in-*
"*to a contract with your orator whereby the*
"*said State granted to your said orator the*
"*exclusive right and franchise to construct*
"*and operate a railroad upon the said route.*"

The Appellees find themselves quite unable to submit any further argument upon this matter than to point out that there is not one word in chap. 908 of the laws of 1896 (the tax law of the State) granting any right to construct or operate a railroad or making the incorporation tax a consideration for any such right. The incorporation tax is levied solely under sect. 180 of that act.

VII.

Nor are there merits in the other contentions of the appellants.

1. They argue that, because, upon the preliminary application made by the Central Company to the General Term of the State Supreme Court for the appointment of commissioners to determine whether its railroad ought to be allowed to be built, the court made an order (*Exhibit B*) for the

appointment of commissioners and in it recited that the Central Company was a "railroad com- " pany formed under chap. 140 of the Laws of " 1850 known as the general railroad act * * * " and that, according to the routes and plans " adopted by the petitioner, it" was "necessary " to build said railroad underground and in a " tunnel; and that it" was "the intention of the " petitioner so to build such railroad under the " provisions of chap. 582 of the Laws of 1880," therefore the court adjudged as against the whole world the validity of the company's incorporation and franchise.

Upon this also, serious argument seems to be impossible. The order was *ex parte* (pp. 39-40). The only requirement of notice to the parties interested was of a notice to be given by the commissioners, after their appointment of a meeting on 10th February, 1883, at 1 P. M.; but no such meeting appears to have been held and no such notice appears to have been given. On the contrary, it appears that, after the vacancy made by the refusal of one commissioner to serve, the court declined to make any further appointment, and that the commission never acted. The order has not a single element of an adjudication of the incorporation of the Central Company; and much less of any recognition by the court or any other authority of a right on the part of the company to build a railroad. That right indeed, was the very thing to be later determined in the proceeding initiated by the order. The Appellant's counsel choose to say (their brief, p. 67) that this order was "a decision

"*in rem* which binds all the world." And for support of that proposition they refer to *Matter of Union Elevated R. R. Co., 112 N. Y., 61:* That case is as far from the case presented by Appellants as can well be imagined. The court, there upon an application to condemn private property, dealt with a completed railroad franchise. Such franchise had been initiated under the former rapid transit act, chap. 606 of the laws of 1875; the mayor of the City had, under that act, appointed commissioners, who, pursuant to its terms, had laid out the routes and adopted the plan of construction of the railroad; the petitioning company had then, pursuant to the act, been publicly incorporated under the auspices of such commissioners; the local authorities had thereupon given their consent; and thereupon,—the abutting owners not consenting,—the General Term of the Supreme Court, pursuant to the Constitution of the State, had appointed commissioners who, upon public notice to all interested, had reported in favor of the construction; and their determination had been confirmed by the General Term. The franchise was thus completed according to the constitution and the rapid transit act with the assent of the municipal authorities and of the General Term of the Supreme Court. The proceedings consummated by the decision of the General Term were held to be proceedings *in rem* binding all the world. The case obviously brings no authority to the support of the Appellants' proposition, destitute, as they are, of any of the title thus set forth.

2. We do not deem it necessary to argue the Appellant's proposition (*their brief, pp. 67, 85*) that the imposition of taxes upon their companies estopped "the City of New York, the officers and " citizens of that City, and all persons subse- " quently contracting with that City" to build a rapid transit railroad.

It is, perhaps, proper, however, that we should refer to the statement of the learned counsel at *p.* 85 of their brief as follows:

> "The receipt of the taxes *upon the fran-* " *chises* estops the City from disputing their " existence."

There is nothing in the bill which shows that any tax was ever levied upon any franchise to build a road claimed by the bill. The references of the bill to the payment of taxes are: *First,* at *p. 11,* where it is said that, upon the incorporation of the Underground Company and the consolidation into it of the Central Company in 1896, the Underground Company paid the incorporation tax of ⅛ of 1 per cent. upon its capital stock; and, *Secondly,* at *p. 13,* where the Complainant Rapid Transit Company, upon its incorporation, on 10th April, 1897, paid a tax of $125, or ⅛ of 1 per cent. upon its capital stock; and, *Thirdly,* at *p. 14,* where the Complainant Rapid Transit Company is alleged to have "paid taxes duly assessed " against it by the City, County and State of New York." There is nothing in the bill showing or tending to show the payment of any tax upon any right, real or pretended, to construct a railroad in the streets of New York.

3. The Appellants argue at *pp. 82 et seq.* of their brief that the Appellees cannot avail themselves of the failure of the Appellants which the bill itself alleges to begin the construction of any railroad; and the brief refers (p. 28) to the allegation of the bill that the defendants had by their acts prevented the complainants from constructing their road. But upon examination of the bill, as has already been pointed out, no acts of the defendants or any of them are referred to except those under the municipal rapid transit act of 1894. That was eleven years and more after the incorporation of the Central Company. Nor did the bill allege any specific act of the defendants, other than the conduct of the necessary legal proceedings to complete the municipal franchise, until the making of the contract in 1900, almost nineteen years after the incorporation of the Central Company.

4. In order to bring their case within the provision of the New York statute (chap. 433 of the laws of 1893) providing that, where any steam railroad corporation incorporated under the act of 1880 "has acquired the real property necessary " for its roadbed by purchase," the time for beginning its construction should be extended, the Appellants' counsel choose to say at p. 99 of the brief that

> " The complainants have acquired the real " property necessary for their roadbed *by* " *purchase through the payment of their* " *franchise taxes* to the City and State of " New York."

This assertion perhaps caps the climax of the complainants' claim. The suggestion that the payment of the taxes for the mere privilege to be a corporation is equivalent to a conveyance of real estate to the company paying them, was hardly fit, it seems to us, for submission to this Court.

5. The Appellants argue (their brief, p. 107) that the relief they seek will not delay the construction or operation of the rapid transit railroad. They refer to the offer made in their behalf to repay to the City the amount which it has advanced,—the total cost of the construction being, as stated in the bill, $36,500,000. The Appellants say that the Appellees are estopped by their demurrer from disputing their ability to make this enormous payment. Perhaps they are so estopped. They suggest to the Court that, upon the security of their franchise, "the money necessary for this purpose " could be borrowed in Wall Street within half an " hour." If the Appellants' franchise be so valuable, it is somewhat amazing that during the twenty-two years since the incorporation of the Central Company nothing except the conduct of paper proceedings has been done to build a railroad under it or under any right asserted by the complainants.

6. The constitutionality of the rapid transit act needs no consideration unless this Court shall return the cause to the court below as within its jurisdiction. It is proper to point out that the

Court of Appeals of the State affirmed its constitutionality after elaborate argument.

Sun Printing Co. v. *New York*,
52 N. Y., 257.

VIII.

The first question certified requires no answer.

It is submitted that this question was not authorized. Sect. 5 of the Evarts act provides that, upon an appeal from an existing Circuit Court direct to this court, where "the jurisdiction of the "court is in issue * * * the question of juris- "diction alone shall be certified to the Supreme "Court for decision." It is submitted that the sole question here referred to is whether the court below could originally take cognizance of the suit; and not another and later question of jurisdiction, which might or might not arise after the primary question of jurisdiction should be decided. If the court below had held that there was jurisdiction, and had then decided the federal question adversely to the complainants, and had then dismissed the bill for want of jurisdiction, refusing to consider the other matters presented by the complainants, then the question first certified might arise. But that is not the present case. And there is a further consideration.

If the second question,—Whether the Circuit Court below had jurisdiction of the bill,—be an-

swered in the negative, very certainly that court should not have proceeded further, nor should this Court proceed further except to affirm the dismissal of the bill.

If, on the other hand, it should be held that the Court below had jurisdiction, the cause will, no doubt, be returned to that court that it may exercise that jurisdiction to investigate the right alleged to belong to the complainants and to arise under the constitution of the United States. When that right appears, and not until then, will any question arise whether or not,—that right being adjudged adversely to the complainants,—the court below has jurisdiction to deal with questions, not federal, which are presented by the complainants' bill.

We venture, besides, to point out to the Court that the first question certified is not distinctly phrased. It asks whether, if the complainant to a bill of equity, claiming a federal right, and the parties all being citizens of the same State, "shows " no right arising under the constitution of the " United States, ought the Circuit Court to decide" other matters of equitable cognizance pleaded in such bill "which are not Federal." The words "shows no right" are ambiguous. If they refer to the face of the bill, then very certainly the court had no jurisdiction when it appeared on the face of the bill that no federal right is involved. If, on the other hand, the implied assumption is that the Circuit Court by sufficient allegations in the bill has originally acquired jurisdiction, but upon the taking of testimony the complainant's assertion of a Federal right is disproved, and if the question then

is, *Whether jurisdiction having originally attached upon a genuine federal question, and, upon that question, the complainants having failed on the merits, the Court shall proceed to deal with the other questions,*—we have only to say that no such assumption is justified, in any view of the present record. The only question here is, Whether, upon the face of the bill, there were Federal jurisdiction.

FINALLY.

The decree of dismissal for want of jurisdiction should be affirmed.

New York, January 12th, 1904.

EDWARD M. SHEPARD,
GEO. W. WICKERSHAM,
DE LANCEY NICOLL,
of Counsel for the Appellees.